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No. 07-1539

In the Supreme Court of the United States

LESLIE D. MOWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's use of the 2001 Sentencing Guidelines violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, when affirmative acts in furtherance of each offense were committed after 2001.

2. Whether the district court abused its discretion in admitting the government's summary charts.

3. Whether the district court erred in holding that the statute of limitations for petitioner's tax evasion offenses began to run after the last affirmative act of evasion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-82) is reported at 518 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2008. The petition for a writ of certiorari was filed on June 7, 2008. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and six counts of tax evasion, in violation of 26 U.S.C. 7201, for the tax years 1992 through 1997. The district court sentenced peti-

tioner to 27 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-82.

1. Petitioner and her husband, Thomas Mower, owned corporations in the United States (Neways US), Australia (Neways Australia), and Malaysia (Neways Malaysia) that used a multilevel marketing system to sell personal care products. Pet. App. 4. The corporations sold their products to distributors, who then recruited other distributors to sell the products to the public. *Id.* at 4-5. Petitioner primarily dealt with the corporations' distributors, although she also made decisions "on a daily basis for Neways US" and served as Chief Financial Officer of Neways US during the mid-1990s. *Id.* at 5. The Mowers created a number of entities as a way to transfer income from the corporations to bank accounts they controlled; those entities never filed corporate tax returns and never paid federal taxes. *Id.* at 7-9, 23-24. All three corporations regularly issued commission checks to those entities, and the commission checks were ultimately deposited into accounts controlled by petitioner and her husband. *Id.* at 6-9. Petitioner and her husband used some of the proceeds from commission checks to purchase a $650,000 property, called Hobble Creek, in 1993 or 1994. *Id.* at 10-11.

In 1997, an IRS agent began investigating the Mowers' finances. Pet. App. 12. In order to conceal the fact that the Mowers had used unreported commission income to purchase the Hobble Creek property, James Thompson, Neways US's attorney, created a backdated loan document that purported to show that the $650,000 had been a loan from Neways Australia. *Id.* at 13. Petitioner's husband, who signed the loan document, provided it to the IRS as proof of the loan. *Id.* at 13-14.

Neither petitioner's husband nor petitioner (who knew about the loan document and was kept apprised of the situation), however, ever informed the agent that the document had been created after the fact and backdated. *Id.* at 14. The IRS agent traveled to Australia to investigate the payments from Neways Australia to the Mowers; he found no evidence that a loan had been made. *Ibid.* An attorney for Neways US told the agent that Neways Australia had not properly documented the loan and that Neways US planned to file amended corporate tax returns to reflect the funds received. *Ibid.*

When an accountant from Neways US learned that the funds received were not a loan, she thought that the Mowers should amend their individual income tax returns to show the commission checks as an additional $876,324 in income to the Mowers. Pet. App. 19. An outside accounting firm ultimately prepared amended individual returns, showing that the Mowers owed over $300,000 in taxes, penalties, and interest for the 1994, 1995, and 1996 tax years. *Ibid.* Petitioner and her husband never filed the amended individual returns. *Id.* at 20. Instead, in 1998, they filed amended corporate returns showing approximately $500,000 in additional corporate income for the 1994 and 1995 tax years. *Ibid.* Petitioner also filed another amended corporate return on January 11, 2002. Gov't C.A. Br. 70.

2. On December 19, 2002, petitioner and her husband were indicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and six counts of tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 4.[1]

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[1] On April 8, 2003, a superseding indictment added James Thompson as a third co-defendant and charged him with conspiracy to defraud the

Before trial, petitioner argued that four of the tax evasion counts—for tax years 1992, 1993, 1994, and 1995—were barred by the six-year statute of limitations. Pet. App. 43-44. The district court rejected that argument, determining that petitioner had continued her evasive conduct into 1998 and that the statute of limitations did not begin to run until the date of the last evasive act. *Id.* at 44-45.

During trial, petitioner objected to the government's presentation of summary charts that reflected petitioner's and her husband's actual income and expenses based on the evidence admitted at trial. Pet. App. 48-50. The district court admitted the summary charts, but instructed the jury that the charts themselves were not evidence and that the jury could disregard the charts if it found them to be inaccurate. *Id.* at 51.

On March 18, 2005, following a 10-day jury trial, petitioner was convicted on all counts. Pet. App. 27; Gov't C.A. Br. 3.

3. At sentencing, the district court found that overt acts were committed after 2001. Pet. App. 28. Accordingly, the court used the 2001 version of the Sentencing Guidelines to calculate the advisory Guidelines range. *Ibid.* Petitioner did not argue at sentencing that the use of the 2001 Guidelines violated ex post facto principles. *Id.* at 76. The court sentenced petitioner to 27 months of imprisonment, which was the minimum of the advisory Guidelines range. *Id.* at 28.

United States, in violation of 18 U.S.C. 371, and corruptly endeavoring to interfere with the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 4. Thompson filed a petition for a writ of certiorari on June 5, 2008 (No. 07-11311), and the government waived its right to respond.

4. The court of appeals affirmed. Pet. App. 1-82.

The court of appeals rejected petitioner's argument that the statute of limitations barred four of the tax evasion counts. Pet. App. 44-47. It agreed with the district court that the statute of limitations did not begin to run until petitioner had completed the last affirmative act of evasion. *Id.* at 44. Because petitioner filed a false amended corporate return on January 6, 1998, and because that constituted an act of evasion occurring within six years of the indictment, the court held that all the tax evasion counts fell within the statute of limitations. *Id.* at 45-46.

The court of appeals also rejected petitioner's contention that the district court abused its discretion in admitting the summary charts. Pet. App. 49. The court noted that the government's evidence was "incredibly voluminous;" that each item listed in the summaries corresponded to at least one piece of evidence; that petitioner thoroughly cross-examined the IRS agent who presented the summaries; and that the district court gave an instruction cautioning the jury that the charts were not evidence and that the jury could disregard them. *Id.* at 50-51.

Finally, applying plain-error review, the court of appeals held that the district court's use of the 2001 Guidelines did not violate the Ex Post Facto Clause. Pet. App. 77-78. It agreed with the district court that "the evidence showed overt acts (for conspiracy) and affirmative acts of evasion (for the six counts of tax evasion) that occurred after 2001." *Id.* at 77. Given that all the offenses continued after the date on which the 2001 Guide-

lines became effective, the court reasoned, there was no ex post facto violation. *Id.* at 77-78.[2]

ARGUMENT

1. Petitioner first asserts (Pet. 14-26) that the district court's use of the 2001 Guidelines violated the Ex Post Facto Clause and that the court of appeals' decision to the contrary conflicts with decisions of the Third and Ninth Circuits. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. In any event, petitioner's approach would not alter her ultimate sentence. Accordingly, further review is not warranted.

a. The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 U.S. 386, 390 (1798)). In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court interpreted the Ex Post Facto Clause to bar the retroactive application of a revised version of state sentencing guidelines that increased a defendant's presumptive sentencing range. When the federal Sentencing Guidelines were considered mandatory, the courts of appeals uniformly had applied this Court's holding in *Miller* to the Guidelines. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) ("We thus join all of our sister circuits in holding that a guideline amendment which occurs after

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[2] The court of appeals also rejected petitioner's claims (not raised here) that the evidence was insufficient to convict her of all counts, that the district court erred in not giving certain jury instructions, that the district court erred in denying her motion for severance, and that her sentence was unreasonable. Pet. App. 3-4.

the commission of the defendant's crime which works to the defendant's detriment is inapplicable because it is a violation of the Ex Post Facto Clause.").

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court invalidated mandatory Guidelines and rendered the Guidelines effectively advisory. In the wake of *Booker*, the government articulated the view that the Guidelines continued to play a pivotal role in constraining district-court sentencing discretion and in channeling appellate review. Reasoning from that premise, the government took the position that the Ex Post Facto Clause applied to advisory Guidelines. Several courts of appeals have expressed, with little analysis, the view that the Ex Post Facto Clause continues to apply to advisory Guidelines. See *United States* v. *Kilkenny*, 493 F.3d 122, 126-127 (2d Cir. 2007); *United States* v. *Wood*, 486 F.3d 781, 790 (3d Cir.), cert. denied, 128 S. Ct. 130 (2007). The Seventh Circuit reached a different result, however. See *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006) (holding that the Ex Post Facto Clause did not bar application of a post-offense amendment that increased the advisory Guidelines range), cert. denied, 127 S. Ct. 3055 (2007). And more recent decisions of this Court, clarifying the operation of the advisory Guidelines and rejecting several of the foundational premises of the government's analysis, have led the government to reconsider its position. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 564, 570 (2007) (holding that a sentencing court may consider the disparity in the Guidelines' treatment of crack and powder cocaine offenses as a basis for varying from the Guidelines range); *Gall* v. *United States*, 128 S. Ct. 586, 594-597 (2007) (stating that district courts "may not presume that the Guidelines range is reasonable"; rejecting application of "a

heightened standard of review to sentences outside the Guidelines range"; and stating that the "rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion" in *Booker*) (quoting *Booker*, 543 U.S. 220); *Irizarry* v. *United States*, 128 S. Ct. 2198, 2202 (2008) (holding that Fed. R. Crim. P. 32(h) does not require district courts to give notice before varying from the Guidelines range based on a previously unidentified factor because, "[n]ow faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice"). In light of those decisions, the government's view is that the Ex Post Facto Clause does not apply to changes in advisory Guidelines.

b. Even if the Ex Post Facto Clause still applied, it was not violated in this case. As an initial matter, because petitioner failed to preserve her ex post facto claim in the district court, the court of appeals reviewed it only for plain error. Pet. App. 76. Petitioner therefore could prevail only if error was "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997).

The courts of appeals uniformly have held that the Ex Post Facto Clause does not bar the application of a revised version of the Guidelines to a conspiracy offense that began before the revision but continued after the revision's effective date. See, *e.g.*, *United States* v. *Aviles*, 518 F.3d 1228, 1230-1231 (11th Cir. 2008); *United States* v. *Firment*, 296 F.3d 118, 120-121 (2d Cir. 2002); *United States* v. *Smith*, 46 F.3d 1223, 1239 (1st Cir.), cert. denied, 516 U.S. 864 (1995); *United States* v. *Shorter*, 54 F.3d 1248 (7th Cir.), cert. denied, 516 U.S. 896 (1995); *United States* v. *Stanberry*, 963 F.2d 1323,

1327 (10th Cir. 1992). Here, petitioner was convicted of one count of conspiracy to defraud the United States and six counts of tax evasion for tax years 1992 to 1997, and she was sentenced under the 2001 Guidelines. The district court found, and the court of appeals agreed, that petitioner committed overt acts in furtherance of the conspiracy and affirmative acts of evasion after 2001. Pet. App. 77. None of her offenses was completed before the effective date of the 2001 Guidelines, and thus there was no retroactive application of those Guidelines. *Ibid.* ("all of her offenses continued after the date on which the 2001 Guidelines became effective"). Accordingly, the court of appeals correctly held that the use of the 2001 Guidelines did not violate the Ex Post Facto Clause. *Id.* at 77-78.[3]

Petitioner argues (Pet. 18-22) that the circuits disagree whether a sentencing court violates the Ex Post Facto Clause when it applies a revised version of the Guidelines to all the offenses, some of which were completed before and some of which were completed after the revision.[4] Although petitioner appears correct that

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[3] The court of appeals noted that the district court committed a procedural error when it used the 2001 version of the Guidelines but relied on the tax table, Guidelines § 2T4.1, from the 2005 Guidelines. Pet. App. 72. Although the district court's use of two different versions of the Guidelines violated the rule requiring the use of a single version of the Guidelines manual (see note 4, *infra*), the court of appeals correctly held that any error was harmless, because "the sentencing table in both sets of Guidelines is the same with regard to [petitioner]." *Ibid.*

[4] See Guidelines §§ 1B1.11(b)(2) (sentencing court must apply the appropriate Guidelines Manual "in its entirety"), 1B1.11(b)(3) ("If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.").

some conflict exists on that question,[5] that question is not implicated here. This is *not* a case where some offenses were completed before and some after the effective date of the Guidelines used during sentencing. Rather, as discussed above, "*all* of [petitioner's] offenses"—the conspiracy count and the six counts of tax evasion—"continued after the date on which the 2001 Guidelines became effective." Pet. App. 77 (emphasis added). Therefore, the alleged circuit conflict does not bear on petitioner's sentencing.

In any event, even if any doubt remained as to the applicability of the 2001 Guidelines to the earlier tax evasion counts, there is no reason to believe that would benefit petitioner, because those Guidelines undoubtedly properly governed at least the conspiracy count (see p. 8, *supra*). Petitioner's base offense level (enhanced by two for sophisticated means) was based on the total tax loss (calculated to be $89,112), giving rise to a Guidelines range of 27-33 months. Pet. App. 28. She was sentenced concurrently on all counts to the minimum of that range. *Ibid.* That total tax loss, and thus the base offense level and minimum Guidelines range, would be the same for the conspiracy count *regardless* of which version of the Guidelines applied to the tax evasion counts. That is because the base offense level for conspiracy in cases such as this is based on the total tax loss from the conspiracy as well as the tax loss from all relevant con-

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[5] Compare *United States* v. *Ortland*, 109 F.3d 539, 545-546 (9th Cir.) (ex post facto violation), cert. denied, 522 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1403 (3d Cir. 1994) (same), cert. denied, 517 U.S. 1137 (1996), with *United States* v. *Bailey*, 123 F.3d 1381, 1404-1406 (11th Cir. 1997) (no violation); *United States* v. *Cooper*, 63 F.3d 761, 762 (8th Cir. 1995) (same), cert. denied, 517 U.S. 1158 (1996).

duct (including other related tax crimes).[6] Accordingly, petitioner cannot establish, as is her burden in plain-error review, that her total sentence would change.

2. Petitioner next argues (Pet. 27-40) that the district court abused its discretion in admitting the summary charts and that the standard governing such admissions needs clarification. The decision of the court of appeals in this case does not conflict with any decision of this Court or of another court of appeals, and the factbound question whether the district court abused its discretion in this case does not warrant this Court's review.

Federal Rule of Evidence 1006 provides that "[t]he contents of voluminous writings * * * which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." The Federal Rules of Evidence also provide that "The [district] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and]

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[6] See Guidelines §§ 2T1.1(a)(1) (2001) (tax loss amount determines base offense level), 1B1.3(a) (2001) (base offense level calculations should include all relevant conduct). In criminal tax cases, relevant conduct includes tax loss from other related tax crimes. See *id.* § 2T1.1, comment. (n.2) (2001) ("In determining the total tax loss attributable to the offense (see *id.* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."); see also *id.* § 1B1.3, comment. (n.9(B)) (2001) ("[A] defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct."). Moreover, the Guidelines contemplate that relevant conduct may include a crime for which a defendant has been convicted and has received a separate sentence. See *id.* § 5G1.3(b) & comment. (n.2) (2001).

(2) avoid needless consumption of time." Fed. R. Evid. 611(a). And petitioner acknowledges (Pet. 27) that the district court's decision "whether to allow the use of summary charts lies within the district court's discretion."

In this case, the evidence presented at trial included hundreds of commission checks and wire transfer receipts. Gov't C.A. Br. 44. That evidence was highly relevant, as the indictment alleged that those checks and wire transfers constituted the income that the defendants failed to report to the IRS and on which they attempted to evade tax. The court of appeals found that the evidence was "incredibly voluminous" and that "it would have been incomprehensible to the jury without summarization." Pet. App. 50. As the court of appeals noted, "[e]ach item listed on the summaries was supported by at least one piece of evidence, such as a check, deposit slip, bank record, or wire transfer receipt." *Ibid.* The IRS agent who presented the summaries assumed that the items listed constituted income to the Mowers, but that assumption was explained to the jury. *Ibid.* Petitioner had ample opportunity to cross-examine the IRS agent, and the district court specifically instructed the jury that the summary charts themselves were not evidence and that the jury was free to disregard the summaries. *Id.* at 51.

None of the cases cited by petitioner (Pet. 27-40) conflicts with the reasoning of the court of appeals in this case. See, *e.g.*, *United States* v. *Milkiewicz*, 470 F.3d 390, 398-399 (1st Cir. 2006) (finding no abuse of discretion when jury clearly understood assumptions underlying summary charts, defendant thoroughly cross-examined agent who compiled the summaries, and district court gave limiting instruction); *United States* v. *Means*,

695 F.2d 811, 817 (5th Cir. 1983) (upholding the admission of summary charts when assumptions underlying summary were based on the evidence and clearly explained to the jury). And the cases that petitioner cites in which courts have reversed on the basis of improperly admitted summary charts are clearly distinguishable. See, *e.g.*, *United States* v. *Citron*, 783 F.2d 307, 316-317 (2d Cir. 1986) (holding that admission of summary chart was abuse of discretion when there was no foundation laid for the figures in the summary and no explanation of the calculations underlying the summary); *Steele* v. *United States*, 222 F.2d 628, 629 (5th Cir. 1955) (reversing based on admission of summary chart when there were significant "omissions, interpretations and discrepancies between the record and these exhibits and a considerable portion of the testimony").

3. Petitioner asserts (Pet. 40-53) that four of the tax evasion counts were barred by the statute of limitations and that the circuits are divided on the question of when the statute of limitations begins to run in tax evasion cases. The court of appeals' decision is correct, and there is no such division among the circuits. The issue therefore does not warrant further review.

The statute of limitations for tax evasion is six years. 26 U.S.C. 6531. The elements of tax evasion are the existence of a substantial tax deficiency, an affirmative act constituting an evasion or attempted evasion of tax, and willfulness. 26 U.S.C. 7201; see, *e.g.*, *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *Spies* v. *United States*, 317 U.S. 492, 498-499 (1943). The general rule is that the statute of limitations for attempted tax evasion begins to run on the date the last affirmative act of evasion occurred. See, *e.g.*, *United States* v. *Anderson*, 319 F.3d 1218, 1219 (10th Cir. 2003); *United States* v. *Butler*, 297

F.3d 505, 511 (6th Cir. 2002), cert. denied 538 U.S. 1032 (2003); *United States* v. *Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999); *United States* v. *Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States* v. *DiPetto*, 936 F.2d 96, 97-98 (2d Cir. 1991); *United States* v. *DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987); *United States* v. *Ferris*, 807 F.2d 269, 271-272 (1st Cir. 1986), cert. denied, 480 U.S. 950 (1987). As the court of appeals in this case recognized, "to hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed." Pet. App. 45 (quoting *United States* v. *Dandy*, 998 F.2d 1344, 1355 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994)).

This Court's decision in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46 (1952), supports the rule that the statute of limitations does not begin to run until the last affirmative act of evasion has taken place. In that case, defendants were charged with attempting to evade tax by making false statements to Treasury representatives. They had filed a fraudulent corporate income tax return in January 1945 and then, ten months later, made a false oral statement to the IRS about the return. *Id.* at 44. On September 14, 1951, the grand jury returned an indictment charging the defendants with one count of "willfully and knowingly attempt[ing] to defeat and evade a large part of the taxes due and owing * * * by making certain false and fraudulent statements and representations, at a hearing and conference" with IRS employees on or about October 24, 1945. *Id.* at 44-45. Although this court declined to consider whether "the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed," *id.* at 46-47, this Court held that "[t]he six-year

limitation period * * * had expired on a charge for filing a false tax return in January 1945, but it had not expired on a charge of making false statements to Treasury employees in October 1945." *Id.* at 44. This Court thus has recognized that evasive acts after the filing of a return may constitute attempts to evade tax.

Here, the district court properly found, and the court of appeals agreed, that petitioner's filing of false amended corporate returns in 1998 was an affirmative act of evasion designed to conceal unreported income that petitioner had received in prior years. Petitioner does not appear to contest that factbound determination before this Court, nor would such a dispute warrant this Court's review. Because that act of evasion (relevant to all the tax-evasion counts for the pre-1996 tax years) occurred within six years of the 2002 indictment, none of those counts was barred by the statute of limitations. Pet. App. 44-47.

Petitioner argues (Pet. 48-49) that there is a division among the circuits regarding whether tax evasion is a "continuing offense." But the issue here is when the statute of limitations begins to run, not whether tax evasion is a continuing offense. See Pet. App. 47 & n.13 ("the 'continuing offense' doctrine is irrelevant here"). In any event, the Second and the Ninth Circuits—two of the circuits that petitioner claims have adopted rules that conflict with the court of appeals' holding in this case—have held that the statute of limitations begins to run after the last affirmative act of evasion. See *DiPetto*, 936 F.2d at 98 ("[W]e are in accord with several other courts which have held that a section 7201 prosecution involving the failure to file income taxes is timely if commenced within six years of the day of the last act of evasion, whether it is the failure to file a return or

some other act in furtherance of the crime."); *DeTar*, 832 F.2d at 1113 ("Even if the taxes evaded were due and payable more than six years before the return of the indictment, the indictment is timely so long as it is returned within six years of an affirmative act of evasion."). The Third Circuit cases that petitioner relies upon do not even address the statute of limitations in tax evasion cases. See *United States* v. *Pollen*, 978 F.2d 78, 86-87 (3d Cir. 1992), cert. denied, 508 U.S. 906 (1993) (holding that indictment charging multiple counts of tax evasion was not multiplicitous for double jeopardy purposes); *United States* v. *McGill*, 964 F.2d 222, 233-235 (3d Cir.) (reversing tax evasion convictions because there was insufficient evidence of affirmative acts of evasion), cert. denied, 506 U.S. 1023 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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